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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/772,526	02/05/2004	N.R. Gandhi	5333	5398

22922 7590 04/16/2009  
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EXAMINER
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CHAWLA, JYOTI

ART UNIT	PAPER NUMBER
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1794

NOTIFICATION DATE	DELIVERY MODE
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04/16/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

IPAdmin@reinhardtllaw.com

### Office Action Summary

**Application No.**

10/772,526

**Applicant(s)**

GANDHI ET AL.

**Examiner**

JYOTI CHAWLA

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 1/7/09.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/55/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Applicant's submission filed on January 7, 2009 has been entered. Claims 11, 13 and 16 have been amended. Claims 1-17 remain pending and are examined.

#### ***Claim Rejections - 35 USC § 112***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Rejections of claims 13 and 16 under 35 U.S.C. 112 as being indefinite for indefiniteness and lack of antecedent basis have been withdrawn in light of applicant's amendments of January 7, 2009.

#### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

A) Claims 1-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marshall (US 4678673) in view of Osaka et al (US 3937843).

The references and rejection are incorporated herein and as cited in the previous office action mailed July 7, 2008.

Regarding the newly added limitation of pH to the process as recited in claim 11, applicants are referred to the rejection of claim 1, in the previous office action dated 7/7/08, where Marshall in view of Osaka teach the pH in the recited range as claimed.

Amendment to claim 13, does not add any limitation.

Regarding the amendment to claim 16, wherein the fat content of 9-30 weight percent as recited in soy based composition, Marshall teaches of s based imitation dairy compositions (Columns 1-2), as discussed in the previous office action, wherein the fat content of fermented soy based imitation dairy product is from about 10 to about 40 weight percent (Column 2, lines 65-68), which falls in applicant's claimed range.

### ***Response to Arguments***

Applicant's arguments filed 1/7/2009 have been fully considered but they are not persuasive.

Applicants' allege that there is "no reasonable expectation that combination of Marshall with Osaka would provide beneficial results" (Remarks, page 6, lines 5-6). The applicants support their allegation by statement that "While a pH below 6.0 is unacceptable in Marshall, Osaka describes a wide Ph range including pH parameters below 6.0." (Remarks, page 5, last paragraph). Applicants also state "Marshall, Osaka and other art in this area show an infinite number of processing approaches can be taken, depending upon type of soybean product" (Remarks, page 6, lines 1-2). The applicants' acknowledge that various approaches to produce fermented soy based products were known to one of ordinary skill in the art at the time of the invention. Further, claims 1, 11 and 15 recite a process of making fermented soy product comprising (open ended) bacterial culture. Marshall and Osaka both teach fermentation products obtained from soybean as claimed. Marshall's pH range for "most effective fermentation" lies between 6.0 and 7.0 (Marshall Column 5, lines 1-6), which differs from the invention as claimed. However, Osaka teaches fermented soy products wherein the pH of the fermented product is in the invention as claimed.

The fermentation of soy as taught by Osaka is carried out in the presence of Lactic acid bacteria, such as, *Lactobacillus bulgaricus* and *Streptococcus thermophilus*, (i.e., hemophilic bacteria) (Column 2, lines 40-68), as claimed. The range of pH of the fermented products as taught by Osaka is 3.6 to 7.5, which includes applicant's recited

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range. Osaka further teaches of a fermentation temperature range of 30°C to 45°C (Column 3, lines 5-10). Osaka also teaches of fermenting the product to varying acidity levels based on the product desired. Thus, fermentation of soy using thermophilic bacteria in the temperature range as recited by the applicant (claims 11 and 15) and to yield a product with an acidity in the recited range of the applicant (claims 1 and 15) was known at the time of the invention. Further, fermentation of soy milk with bacteria to yield soy dairy products like sour cream were also known at the time of the invention (Marshall, Column 1, lines 28-38). Therefore, to modify Marshall and ferment soy using thermophilic bacteria, in the temperature range as taught by Osaka for a time period to yield an acidic soy product as taught by Osaka, would have been a matter of routine determination by experimentation for one of ordinary skill in the art at the time of the invention. One would have been motivated to modify Marshall and prolong the time of fermentation in order to make a soy product with greater sourness or acidity, such as soy based yogurt product. Thus to ferment soy material for longer period of time or with a higher concentration of bacteria as inoculums or at a slight elevation of temperature does not lend a patentable distinction to the claims, absent any clear and convincing evidence and or arguments to the contrary.

Further, in response to applicant's argument that Osaka and Marshall can not be combined by stating that "no reasonable expectation that combination of Marshall with Osaka would provide beneficial results", the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Applicants' arguments have been fully considered, however, claims 1-17 remain rejected for the reasons of record.

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JC/  
Examiner  
Art Unit 1794

/KEITH D. HENDRICKS/  
Supervisory Patent Examiner, Art  
Unit 1794